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NOTES

CONFLICT OF LAWS—LIABILITY OF A TELEGRAPH COMPANY FOR NEGLIGENT TRANSMISSION OF A TELEGRAM—MENTAL SUFFERING.—From a recent decision in the Supreme Court of North Carolina[1] it would appear that a telegraph company having offices in the State must be especially watchful of the degree of care exercised in delivering its messages, or subject itself to substantial damages for mental anguish and suffering undergone by the addressee. A message delivered to the defendant company in Roanoke, Va., addressed to the plaintiff at Winston-Salem, N. C., announcing the death of a grandchild of the plaintiff, was duly transmitted by the defendant to its offices at Winston-Salem, but through the negligence of the defendant's agent at this latter place was not delivered to the plaintiff until two days after its receipt. As a result of this negligence, the plaintiff was prevented from attending the funeral of the deceased grandchild. Substantial damages were awarded the plaintiff despite the fact that the laws of Virginia do not permit recovery for mental suffering.

The right of the addressee to recover for the negligent trans-

[1] Penn. v. Western Union Tel. Co., 75 N. E. Rep. 16 (N. C., 1912).

mission of a telegram is recognized everywhere in America today,[2] although such is not the case in England.[3] The only question which bothers the Courts concerns the form of action under which such recovery may be had. Some few cases permit an action *ex contractu* only,[4] but probably the majority agree that an action *ex delicto* is also maintainable.[5] When the suit is in contract the well recognized principle that in the absence of any indication of a contrary intention, the validity, obligation and construction of the contract are, conformably to the presumed intentions of the parties, governed by the laws of the place of performance.[6] What constitutes the place of performance has been a puzzling question to the Courts, and as a result the many decisions are in hopeless conflict. Those Courts which hold that the place of performance is in the State in which the contract originates apply the law of that State in actions *ex contractu* for the recovery of damages for mental anguish,[7] while those which hold that the place of receipt of the telegram must be considered the true place of performance, apply the law of this latter place.[8] A penal statute permitting the recovery of a stipulated sum in addition to the actual damages proven is never enforced except in the State in which it has been enacted.[9] Nor will a contract valid in one State be enforced in another if such contract is clearly void under the law of the forum.[10]

So long, then, as an action against a telegraph company for negligent transmission of a telegram is considered *ex contractu*, or even *ex delicto* arising out of a contract relation,[11] there ought to be no great difficulty in determining the liability under the fa-

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[2] Milliken v. Western Union Tel. Co., 110 N. Y. 403 (1888); Young v. Western Union Tel. Co., 107 N. C. 370 (1890); N. Y. Tel. Co. v. Dryburg, 35 Pa. St. 298 (1860).

[3] Playford v. United Kingdom Tel. Co., 10 B. &. S. 759 (1869); Dixon v. Renter's Tel. Co., 19 Moak's Rep. 313 (1877).

[4] Francis v. Telegraph Co., 58 Minn. 252 (1894).

[5] Cowan v. Western Union Tel. Co., 122 Iowa, 379 (1904) and cases cited therein.

[6] Story on Conflict of Laws, §280.

[7] Bryan v. Western Union Tel. Co., 133 N. C. 603 (1903), telegram sent from point in North Carolina to a point in South Carolina; action by addressee; law of North Carolina permitting recovery for mental anguish applied.

Western Union Tel. Co. v. Garrett, 46 Tex. Civ. App. 430 (1907); telegram sent from point in Missouri to point in Texas; action by sendee; delay occurred in Texas; law of Missouri denying recovery for mental anguish applied.

Reed v. Western Union Tel. Co., 135 Mo. 661 (1896).

[8] Western Union Tel. Co., v. Lacer, 93 S. W. Rep. 34 (Ky., 1906); telegram sent from point in Indiana to point in Kentucky; action by sendee; delay occurred in Indiana; law of Kentucky permitting recovery for mental anguish applied.

Western Union Tel. Co. v. Fuel, 51 So. Rep. 571 (Ala., 1910); telegram sent from point in Texas to point in Alabama; action by sender; law of Alabama permitting recovery for mental anguish applied.

North Packing & Provision Co. v. Western Union Tel. Co., 70 Ill. App. 275 (1897).

[9] Taylor v. Western Union Tel. Co., 95 Iowa 740 (1895).

[10] Shaw v. Postal Tel. Co., 79 Miss. 670 (1901).

[11] See discussion in Stone v. Postal Tel. Co., 76 Atl. Rep. 762 (R. I. 1910).

miliar rules of damages laid down in *Hadley* v. *Baxendale*.[12] The trouble arises only when the Courts go further and hold that such an action is purely *ex delicto*, and is absolutely independent of any contract relation.[13] It would seem that the tort ought to be considered as having its *situs* at the place where the failure or delay in transmission takes place, and recovery ought to be in accordance with the remedies of that jurisdiction. But it would be unfair to expect the plaintiff to determine the point on the defendant's line where the delay occurred, and it would certainly be unwise to permit the defendant company to show that the message was delayed at some specific point and thus make the plaintiff's right to recovery depend upon the laws of that place. And it can easily be contended that no act of negligence can be said to have occurred until there is a failure to put the message into the hands of the person to whom it is addressed. Guided by these reasons—variously expressed, however—the Courts with practical unanimity have held that it is wholly immaterial at what point along the line the delay may have occurred.[14] The only case in which the Court has departed from this doctrine seems to be *Western Union Tel. Co.* v. *Crenshaw*,[15] but even here too great weight ought not to be given to this part of the opinion, for it was probably unnecessary to the decision in the case.

If, now, we adopt the rule stated above, it would seem that no recovery could be had in a State from which the message is sent, the *situs* of the tort being in the State in which delivery is to be made. *Walker* v. *Western Union Tel. Co.*,[16] however, holds exactly contra. The opinion is rather vague so far as the real reason for the decision arrived at is concerned, but apparently the action is considered *ex contractu* rather than *ex delicto* and recovery permitted under the law of contracts as stated earlier in this note.

Since it is pretty generally held that the addressee of a delayed telegram in an action of contract cannot recover damages for mental suffering, since it is presumed that this is not in contemplation of the parties as a probable result of the breach of the contract,[17] but can recover for such suffering in some States, if the action is in tort,[17] it ought to be of vital importance to know which kind of action should be brought or has been brought. A study of the cases, however, leaves one somewhat in the dark on this question, for in most of the decisions there is no definite reason given why the action should be treated as of one nature rather than the other. Indeed, in our principal case, in which the action was held to be *ex delicto*, the Court distinguishes others, apparently contra, on the sole ground that they were treated as actions *ex contractu* and different rules applied. The tendency in all, however, seems

[12] 9 Exch. 341 (1854).
[13] Balderston v. Western Union Tel. Co., 79 S. C. 160 (1907).
[14] Brown v. Western Union Tel. Co., 67 S. E. Rep. 146 (S. C., 1910).
[15] 125 S. W. Rep. 420 (Ark., 1910).
[16] 75 S. C. 512 (1906).
[17] Jones on Telegraph Companies, §480: but, see also §518.

to be to hold the telegraph companies to the greatest possible degree of care, and considering the valuable rights they enjoy at the hands of the public, this attitude is to be commended.

H. W. W.

LEGAL ETHICS—QUESTIONS AND ANSWERS—We print herewith three more of the questions on legal ethics propounded to the New York County Lawyers' Association Committee on Professional Ethics, with the answers made thereto:

QUESTION:

Is an attorney justified in asking for five thousand dollars damages in a case where he knows his client would be perfectly satisfied with a settlement of a few hundred dollars and where there appears to be no just ground for demanding more than a few hundred dollars?

Is a lawyer guilty of moral turpitude who demands in settlement of a claim for damages an amount far in excess of what he believes to be a proper measure of damages?

ANSWER:

In the case suggested the Committee considered in the absence of a more detailed statement, that the demand should not exceed what, in the opinion of the attorney, would be a maximum proper recovery under the facts which he has reason to believe are the basis of his client's rights.

QUESTION:

May I have your opinion upon the professional ethics of the following situation:

Several years ago I received into my office as a student of law a young man who has since been admitted as a member of the Bar. I assisted him to the best of my ability in his preparations for admission, and commended him to the Character Committee. He was intimately familiar with the affairs of my office, and had my confidence. After his admission to the Bar, he left my office and became associated with another member of the Bar.

While he was a student in my office, I had a client who employed me in a professional capacity in numerous matters, among others the re-organization of a company, whose books he entrusted to my custody for the purpose. This client, at the time of the proposed re-organization, owed me considerable money in other matters in which I had been employed for him personally. I spent considerable time in planning the re-organization, but declined to advance any disbursements therefor. Finally, my client, without discharging any of the indebtedness to me for my services in respect to the said re-organization or for my personal services to him, demanded the return of the books of the corporation, which I declined to return unless some money should be paid to me on account of the debt. I have since been served with an order to show cause in the Supreme Court on an affidavit of my client sworn to before my former student as a notary public, in which the said former student appears as attorney of record for my client, directing me to show cause why I should not turn over the books of the Company to it.

I charged the company what I deemed a reasonable fee for the services rendered to it, all of which were rendered while the student was a clerk in my office. I assume that, as the student appears as attorney of record, he prepared the affidavit upon which the order to show cause was made, and in which the client swears that nothing whatever is due to me for legal services rendered. The student has also in a replying affidavit, made by himself, stated that he was not consulted when the client called on me, though he saw the client visit me on several occasions, but was never informed regarding the subject of the consultation. Notwithstanding this affidavit, he had charge of the filing of all of my papers, and had access to all of my correspondence, and was in a position to be generally familiar with the business of my office.